SUPREME COURT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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Nos. 1231 and 1184

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

*Petitioners,*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

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**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR PETITIONERS TEXAS STATE TILE, ET AL.

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### OPINIONS BELOW

The opinion of the court of appeals (A. 361-397) is reported at —— F.2d ——. The Decision and Order (A.

3-13) of the National Labor Relations Board ("Board" herein) is reported at 172 NLRB No. 77. The underlying Decision and Determination of Dispute (A. 13-25) of the Board is reported at 167 NLRB 185.

## JURISDICTION

The judgment of the court of appeals (A. 398-399) was entered on June 30, 1970. On October 1, 1970, the court of appeals denied timely petitions for rehearing *en banc* filed by petitioners here and the Board (A. 400-401). The petition for a writ of certiorari was timely filed on January 13, 1971 (after an extension was granted by Chief Justice Burger), and certiorari was granted on March 22, 1971 (A. 402). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e)).

## QUESTION PRESENTED

Whether, under Section 10(k) of the National Labor Relations Act, after a union has taken coercive action to protest an employers' assignment of work to one group of employees rather than another, the Board is divested of power to determine the underlying jurisdictional dispute whenever the competing unions have agreed among themselves to be bound by a voluntary method for the adjustment of the dispute although the employer has not consented to be bound by that adjustment.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra*, pp. 47-49.

## STATEMENT

This case involves picketing by the Plasterers Union ("Plasterers"),[1] against two employers at separate and unrelated construction sites in order to obtain for its members work which the employers had assigned to their own employees, who were members of the Tile Setters Union ("Tile Setters").[2] In both instances, the employers were currently recognizing the Tile Setters as the collective bargaining representative of their employees and had for several years entered into collective bargaining agreements with that union (A. 15, 16-17; 28, 55, 59, 355). Neither employer had a collective bargaining agreement with the Plasterers (A. 20).

### A. The Dispute Over Contractor Texas State's Assignment

In 1965, the University of Houston contracted with Southwestern Construction Company ("Southwestern") to construct an addition to the University's Anderson Library. Southwestern then subcontracted the tile and terrazzo work involved on this job to petitioner Texas State Tile and Terrazzo Company ("Texas State") (A. 15; 45-46, 27-28, 36). This work consisted of the application of tile to the walls of the restrooms and to the stairwalls of the eight-story library building. The tile was applied directly to a second coat of Portland cement mortar after a thin scratch coat of cement had been applied to the metal lath by employees represented by the Plasterers (A. 16; 29-30, 36-38, 47-48, 150-152). Texas State, pursuant to its collective bargaining agreement with the Tile Setters, assigned the application of the second coat and the tile to its employees, who were represented by the Tile Setters (A. 15; 40, 45-46, 59-60).

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[1] Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO.

[2] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America.

Representatives of the Plasterers protested to the Tile Setters that the application of the second coat was Plasterers' work (A. 15; 47, 49-50, 52).[3] When the Tile Setters disagreed with this claim, the Plasterers submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a body set up by the Building Trades Department of the AFL-CIO to settle jurisdictional disputes (A. 15; 53). Both the Plasterers and the Tile Setters were bound, as a result of their affiliation with International Unions who are constituents of the AFL-CIO Building Trades Department, to submit jurisdictional disputes to the Joint Board. Texas State was not a signatory to and was not bound in any way to the Joint Board, and neither were its bargaining representatives, the Tile Contractors Association of America or the local chapter of the Tile Contractors (A. 15-16; 46-47). Texas State informed the Joint Board of this fact and stated that it desired to present the dispute instead to the Board (A. 325).

On November 10, 1966, the Joint Board, relying upon precedent of August 22, 1917, ruled that the work in dispute should be assigned to Plasterers (A. 15-16; 327-328). The Joint Board specifically limited its award solely to the particular project (A. 327-328).

After the Joint Board award, the Plasterers sought to obtain the work in question, but Texas State and its employees refused to accede to their demands (A. 6, 16; 52). On January 24, 1967, the Plasterers picketed at the project to protest Texas State's refusal to assign the work to its members, and all crafts working on the job honored the picket line, causing a complete work stoppage (A. 6-7, 16; 31-32, 46). On February 10, 1967, the United States District Court for the Southern District of Texas, upon the application of the NLRB Regional Di-

[3] The second coat is termed the "brown coat" by Plasterers, and is called either the "float coat" or "setting bed" by the Tile Setters (A. 16; 49-50).

rector, enjoined the picketing pursuant to Section 10(l),[4] of the Act. (A. 7, 16; 26-27).

### B. The Dispute Over Contractor Martini's Assignment

In 1967, Rainbo Baking Company of Houston, Texas, decided to remodel the panning room of its bakery. It contracted directly with petitioner Martini Tile and Terrazzo Company ("Martini") to install ceramic tile over a brick wall in the baking area of the bakery (A. 16-17; 55, 97-98). The job required nailing metal lath over the brick, applying a coat of Portland cement mortar directly to the lath, and setting the tile onto the cement mortar (A. 17; 56-57, 97-98, 107-108). Martini, pursuant to its collective bargaining agreement with the Tile Setters, assigned this work to its own employees who were represented by the Tile Setters (A. 16-17; 55, 355).

Martini began working at the project site on March 15, 1967. On March 17, the Plasterers picketed the site in order to force Martini to assign the work involving the application of the cement mortar to Plasterers rather than Tile Setters (A. 7, 17; 55-56, 356). During the picketing, other crafts refused to work, and Rainbo officials requested Martini to remove its employees from the premises (A. 7-8, 17; 356, 58, 97). Martini complied with the request and the picketing stopped (A. 7-8, 17; 97). Martini subsequently returned to the project and completed the job (A. 8, 17; 56).

Although both the Plasterers and the Tile Setters were subject to the Joint Board procedures, the Plasterers did not submit this dispute to the settlement procedures of that body. Martini was not stipulated to or bound by the Joint Board procedures on its own or through any of the associations to which it belonged (A. 55).

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[4] 29 U.S.C. 160(1). See Appendix A, *infra*.

### C. The Proceedings Before The Board

On January 30, 1967, and February 7, 1967, Southwestern and Martini filed separate unfair labor practice charges against the Plasterers with the Board, contending that the Plasterers' picketing in each instance had violated Section 8(b)(4)(D)[5] of the Act. After investigation of the charges disclosed reasonable cause to believe a violation had occurred, the Board, pursuant to Section 10(k)[6] of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose. At the hearing in April 1967, Texas State intervened in the consolidated proceedings and participated in the hearing with the charging parties and competing unions (A. 3-4, 14). On August 22, 1967, the Board issued its Decision and Determination of Disputes.

1. *The Determination of the Jurisdictional Dispute*— In determining the merits of the underlying jurisdictional disputes, the Board rejected the Plasterers' contention that it had no jurisdiction to determine the particular disputes. The Plasterers argued that Section 10(k) divested the Board of jurisdiction over a jurisdictional dispute where "the parties to such dispute" had agreed upon a method of voluntary settlement, and that "the parties" here had agreed upon a method for voluntary settlement since both unions were bound to submit the dispute to the Joint Board. The Board found this

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[5] Section 8(b)(4)(D) is the "jurisdictional dispute" unfair labor practice provision of the Act. In general, it proscribes union picketing or coercion of an employer designed to force or require the employer to assign work to members of one union rather than to members of another union. For the full text of that section, see Appendix A, *infra*.

[6] Section 10(k) directs the Board to determine the merits of the underlying jurisdictional dispute whenever it is charged that Section 8(b)(4)(D) has been violated, *unless* "the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. See Appendix A, *infra*.

contention to be without merit, holding that it had consistently ruled that "the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute" before the Board is divested of jurisdiction under Section 10(k) and that neither of the employers involved here had agreed to be subject to or bound by the Joint Board. Accordingly, the Board concluded that all "the parties" to the dispute had not agreed upon a method for the adjustment of the dispute, and therefore, that the Board had jurisdiction under Section 10(k) (A. 19 n. 3).

On the merits of the dispute, the Board weighed all the relevant factors, including the award of the Joint Board, and concluded that at both projects employees represented by the Tile Setters, rather than those represented by Plasterers, were entitled to perform the work of applying the coat of Portland cement mortar upon which tile was to be installed (A. 20-23).[7] Accordingly, the Board determined that the Plasterers were not entitled to picket or otherwise coerce the employers to assign the work in dispute to its members. The Board directed the Plasterers to notify the Regional Director of the Board within ten days as to whether it would comply with the determination (A. 23-24).

2. *The Unfair Labor Practice Proceeding*—The Plasterers declined to comply with the Board Decision and Determination of Disputes. The Board's General Counsel, pursuant to the applicable Rules and Regulations, thereafter issued a complaint upon the outstanding 8(b)

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[7] The factors considered by the Board included the applicable collective bargaining agreements, the relative skills of the various employee groups, the efficiency of the operation under the respective employee groups, the agreements between the Plasterers and Tile Setters, the industry practice, the employer and area practice, and the Joint Board award (A. 20-23). The Board did not attach controlling weight to the Joint Board award in "view of all the circumstances, including its ambiguous nature, and upon the entire record." (A. 22).

(4)(D) charges (A. 4). The parties waived a hearing on the complaint and submitted the case directly to the Board upon a stipulation and the record in the 10(k) proceeding (A. 4; 355-357).

Upon the entire record, the Board found that the Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson Library and Rainbo Bakery sites for the objects of forcing Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than to employees represented by Tile Setters. The Board again rejected the Plasterers' contention that Section 10(k) precluded the Board from determining the dispute, reiterating its

> consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute", and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section [A. 8].

The Board issued its usual order, requiring the Plasterers to cease and desist from the unfair labor practices found and to post the appropriate notices (A. 10-12).

### D. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan for the majority, with Judge MacKinnon dissenting) set aside and denied enforcement of the Board order (A. 361-397). In the court's view "the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes" (A. 370). According to the court, Section 10(k) requires the Board to abstain from determining jurisdictional disputes whenever "the parties to such dispute" have agreed on a method for the adjustment of such dispute, and that the proper con-

struction of that provision should be that it "is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (A. 371). Since all the unions involved were bound to the adjustment procedure of the Joint Board, the court held that the "parties" to the dispute had agreed on a method for the adjustment of the dispute and that the Board could not properly proceed under Section 10(k) (A. 370, 384-385).

In a dissenting opinion, Judge MacKinnon disagreed with the conclusion that the employer was not one of "the parties to such dispute." Relying upon *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964), he pointed out that under Section 8(b)(4)(D), and therefore 10(k), there is no "dispute" within the contemplation of the Act until one of the unions has made the employer a party to the dispute by striking him or engaging in other coercive action as a result of the employer's assignment of work (A. 393-394). Finding no validity to the court's assertion of support for its position in the legislative history and case law, Judge MacKinnon found the "majority opinion . . . to be an unreasonable interpretation of the Act" (A. 396).

## SUMMARY OF ARGUMENT

### I

Since the jurisdictional dispute provisions were added to the Act by the Taft-Hartley Amendments in 1947, the Board has consistently interpreted Section 10(k) as including the employer as one of the "parties" to a dispute over his assignment of work. Thus, the Board has consistently construed the abstention provision in 10(k), which requires the Board to abstain from deciding a jurisdictional dispute where "the parties to such dispute" have agreed upon a voluntary method of adjustment, as

requiring the consent of both the employer and the unions involved before the provision applies. Otherwise, the Board exercises its usual jurisdiction and determines the merits of the dispute after a 10(k) hearing.

The Board's construction of Section 10(k) in this regard had been accepted without challenge in the courts of appeals for more than 20 years until the decision of the court below, which held that the "parties" to a jurisdictional dispute included only the rival unions and that the Board was therefore deprived of power to determine the dispute whenever the unions involved had agreed upon a method of adjustment of the dispute. Under settled law, the construction of the statute by the Board was entitled to affirmance. This Court has plainly held that the consistent construction of a statute by an administrative agency, particularly where it is a contemporaneous construction by the men charged with setting the statute's machinery in motion, should not be overturned where the construction is a reasonable construction of the statute. *Udall* v. *Tallman*, 380 U.S. 1, 4, 16-18 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Universal Battery Company* v. *United States*, 281 U.S. 580, 583 (1930).

## II

1. The Board's construction is a reasonable interpretation of the statutory language. Section 10(k) must be read with companion Section 8(b)(4)(D), which proscribes strikes and other coercive pressure against an employer to force the employer to assign particular work to particular employees. By its terms, 10(k) is not operative until a strike or other coercive acts has occurred and has resulted in the filing of a charge under Section 8(b)(4)(D). *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964). Thus, Section 10(k) is not operative until one of the disputing unions has made the employer a party to the dispute by striking, etc., to compel the result it desires. It is therefore a reasonable con-

struction of the statutory language to conclude that the phrase "parties to such dispute" encompasses the employer, whose work assignment is challenged, as well as the unions involved.

In addition, the language of Section 8(b)(4)(D) and its legislative history shows Congress' recognition that some jurisdictional disputes within the Act's proscription actually involve disputes directly between a union and the employer over the employer's assignment. *See Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F.2d 38, 47 (8th Cir. 1962); *National Labor Relations Board* v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449, 454 (2nd Cir. 1967). For Congress recognized, and so expressed in 8(b)(4)(D), that an employer's assignment to his own unrepresented employees was entitled to the same statutory protections and dispute-settling procedures as an assignment to a labor organization. Clearly, a union's strike in protest of such an assignment manifests a dispute between the union and the employer. Thus, Congress plainly recognized the employer as one of the "parties to such dispute" within the meaning of 10(k).

2. Although the legislative history does not reflect any discussion of the precise meaning of the word "parties" in 10(k), it does provide support in general for the Board's construction. Section 10(k) in the bill which passed the Senate was practically identical to that section as enacted, except it provided authority for the Board to appoint arbitrators to determine the merits of jurisdictional disputes under 10(k). In conference, the arbitration provision was deleted, and Congress "decided to entrust this decision to the Board." *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 583 (1961). This change plainly reflects Congress' desire to place the public's interest in the determination of jurisdictional disputes in the hands of the Board rather

than private arbitrators. It would be inimical to this purpose to conclude that Congress at the same time intended to oust the Board of jurisdiction under 10(k) and place the determination of jurisdictional disputes in the hands of an inter-union arbitration procedure whenever the unions involved agreed to do so. It is more consonant with the Congressional purpose to conclude that Congress intended 10(k)'s abstention provision to apply only when the struck employer and the unions involved agreed to voluntary arbitration, for in that situation the interests of the public can better be protected through the presence and participation of all the parties interested in the resolution of the dispute.

3. The Board's construction of the statute reflects its recognition of the economic reality that an employer has a direct and substantial substantive interest in his assignment of work to particular groups and in the outcome of disputes challenging this assignment. The Board's construction, contrary to that of the court below, recognizes that fundamental fairness requires, in light of this employer interest, that when the employer's assignment is challenged by means proscribed by the Act, any voluntary method for determining the dispute over the work assignment must provide for the right of the employer meaningfully to participate in all phases of that dispute-settling process.

The Board's construction in this regard comports with the consensual basis of arbitration under national labor policy, and it also comports with essential requirements under the Railway Labor Act for determining jurisdictional disputes.

## III

The contrary decision of the court below rests primarily on the premise that the employer is necessarily a neutral party in jurisdictional dispute controversies. However, this conclusion is contrary to economic realities

and the language of Section 8(b)(4)(D), in which Congress acknowledged the intention to provide statutory protections to jurisdictional dispute controversies where the employer was actively interested rather than neutral. The court's reliance upon dictum from this Court's opinion in *CBS*, *supra*, 364 U.S. 573 (1961), and on various items of legislative history, does not establish that Congress recognized, contrary to the plain economic realities, that the employer was a neutral party who cared not how the dispute was decided.

The court's analysis fails to dispel the reasonableness of the Board's construction of the statute, and therefore the Board's construction must be upheld.

## ARGUMENT

### I. Introduction And Background: The Issue Defined

#### A. *Introduction: Background of the Board's Construction*

The instant case presents an important question of statutory construction involving the jurisdictional dispute provisions of the Act. The court of appeals below, rejecting the settled construction consistently adhered to ever since the enactment of these provisions more than 20 years ago, held that the Board has no authority to determine a jurisdictional dispute where the competing unions involved have agreed upon a binding method for the adjustment of the dispute.

The jurisdictional dispute provisions were added to the Act by the Taft-Hartley Act of 1947. Section 8(b)(4)(D)[8] makes it an unfair labor practice for a union to

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[8] Section 8(b)(4)(D) provides in full:

It shall be an unfair labor practice for a labor organization or its agents—

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[Footnote continued on page 14]

picket or otherwise coerce an employer for the object of forcing the employer to assign work to one union or group of employees rather than to another. Under the scheme of the Act, however, whenever a charge alleging a violation of Section 8(b)(4)(D) is filed, Section 10(k) *directs* the Board, before proceeding with a complaint under 8(b)(4)(D), to

> hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.

In the very first cases brought under the jurisdictional dispute provisions, the Board was forced to determine the relationship of the two sections. In *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (1949) and *International Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949), the Board held the two sections must be read together for a proper interpretation of their meaning. In these cases, the

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[8] [Continued]

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

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(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: * * *

Board rejected the argument that Section 10(k) was applicable only in the limited circumstance where the employer involved in the dispute was neutral and indifferent to the outcome of the dispute, holding instead that Section 10(k) was applicable in all charges of an 8(b)(4)(D) violation.[9] The Board found the statute left it no discretion as to when to invoke 10(k), but plainly "directed" it to invoke that section "whenever" an 8(b)(4)(D) violation was charged. *Moore Drydock, supra*, 81 NLRB at 1114. Accordingly, it held (*Juneau Spruce, supra*, 82 NLRB at 656):

> [I]n the absence of language specifically limiting the application of Section 10(k) to certain situations *only*, or even persuasive legislative history in support of such restricted application, the Board is obliged to give effect to that Section which its language requires.

Moreover, the Board concluded that the statutory language and the legislative history showed that in enacting Section 10(k) Congress found it desirable to give the Board an opportunity to resolve the underlying jurisdictional dispute before proceeding with an unfair labor practice complaint, and that there was no legislative indication of a purpose to have this aim fulfilled in less than all 8(b)(4)(D) charges. *Juneau Spruce, supra*, 82 NLRB at 656. In conjunction with this purpose, the Board noted that in the final bill, as passed, Congress eliminated a provision in the Senate bill which would have permitted the Board to appoint an arbitrator to

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[9] In *Moore Drydock*, a dissenting Board member argued that Sections 8(b)(4)(D) and 10(k) were not coterminous, and that 10(k) was applicable only where the employer was neutral and indifferent as to which of the labor organizations should be entitled to perform the work. Absent that circumstance, the dissent argued the Board should proceed directly with an 8(b)(4)(D) hearing. 81 NLRB at 1128. In *Juneau Spruce*, the Board rejected the same argument presented by the employer involved who had a direct interest in having one union perform the work in question. 82 NLRB at 655.

resolve the dispute under 10(k), and instead placed that responsibility entirely on the Board. *Id.* at 656.[10] Implicit in its decision was the realization that Congress preferred that the Board, as the agency established to vindicate the public interest in labor-management relations, have the primary responsibility, rather than private arbitrators, for resolving jurisdictional disputes.

Of course, neither of these first cases raised directly the issue concerning the scope of the abstention provision of Section 10(k). Shortly thereafter, however, the issue was specifically presented in several cases where the unions involved in disputes contended that they had agreed upon a voluntary method of adjustment, and that therefore the Board was ousted of jurisdiction under the abstention provision of Section 10(k). But in these cases the Board, consistent with its role as the primary agency established by Congress for resolving jurisdictional disputes, declined to abstain from asserting its jurisdiction in the absence of an agreement between the unions *and* the employer for a binding method of adjustment. See *Los Angeles Building & Construction Trades Council (Westinghouse Electric Corp.)*, 83 NLRB 477, 482 n. 7 (1949); *International Hod Carriers, Local 231 (Middle States Tel. Co.)*, 91 NLRB 598, 604 (1950). In subsequent cases, the Board couched its determination of the issue in statutory terms, referring to the employer as one of the "parties" to the underlying jurisdictional dispute within the meaning of Section 10(k), and held that it was divested of jurisdiction under that section only where all the "parties" have "submitted to us satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." *Inter-*

[10] The legislative history on this point is summarized in *N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 581-582 (1961), where this Court found that the effect of eliminating the Senate provision "was simply to place the responsibility for compulsory determination of the dispute entirely on the Board."

*national Union of Operating Engineers, Local 66 (Frank P. Badolato & Sons)*, 135 NLRB 1392, 1396 (1962).[11] The Board has, as in the instant case and subsequent cases,[12] consistently adhered to this interpretation of Section 10(k).

The Board's consistent construction of the statute for more than twenty years had, prior to the instant case, never been challenged by any court of appeals. Indeed, the Board's interpretation has been favorably relied upon by those courts reviewing determinations in jurisdictional dispute cases. See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958; *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966) (unreported officially); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F.2d 5, 9 (3rd Cir. 1969) (citing the Board decision in the instant case for the proposition that the Board need hold a 10(k) hearing only where all parties are not bound to a method for

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[11] Accord: *United Brotherhood of Carpenters, Local 581 (Ora Collard)*, 98 NLRB 346, 349 (1952); *Local 17, International Union of Operating Engineers (Empire State)*, 99 NLRB 1481, 1485 (1952); *United Association of Journeymen & Apprentices, Local 428*, 108 NLRB 186, 197 (1954); *United Association of Journeymen & Apprentices, Local 420 (Frank W. Hoke)*, 109 NLRB 854, 857 (1954); *Local 450, International Union of Operating Engineers (Sline Industrial Painters)*, 119 NLRB 1725, 1731-1732 (1958); *Local 173, Wood, Wire & Metal Lathers (Newark & Essex Plastering Co.)*, 121 NLRB 1094, 1103 (1958); *Newspaper & Mail Deliverers' Union (News Syndicate Co., Inc.)*, 141 NLRB 578, 580 (1963); *Bricklayers & Masons International Union, Local No. 3 (Engineered Building Specialties, Inc.)*, 144 NLRB 1279, 1282 (1963); *Latherers Local 62 (Belou & Co.)*, 150 NLRB 21, 25 (1964).

[12] See *Lathers Union Local 104, Wood, Wire and Metal Lathers International Union (Associated General Contractors)*, 186 NLRB No. 70 (1970); *Local 532, United Brotherhood of Carpenters (D. W. Winkelman Co.)*, 189 NLRB No. 94 (1971).

voluntary adjustment), *reversed on other grounds*, 400 U.S. 297 (1971); *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F.2d 755, 763 (5th Cir. 1966).

### B. *The Issue Presented*

In these circumstances, the ultimate issue before the Court here is whether the Board's consistent construction of the statute is a reasonable interpretation, and therefore should be upheld. For this Court has held on numerous occasions that a consistent interpretation of a statute by an administrative agency should not be overturned where the interpretation is a reasonable construction, though not the only possible construction. *Udall* v. *Tallman*, 380 U.S. 1, 4, 16-18 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Universal Battery Company* v. *United States*, 281 U.S. 580, 583 (1930). This has been held particularly true "where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940), quoting from *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

In *Udall* v. *Tallman*, *supra*, the Court reversed a decision of the District of Columbia Circuit which rejected the Secretary of Interior's construction of an Executive Order and an administrative order issued by the Secretary. In reversing, this Court held (380 U.S. at 4):

> Since their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record . . . . The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must there-

fore respect it. McLaren v. Fleischer, 256 U.S. 477, 481; Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414.

Moreover, in discussing the applicable principles in reviewing issues of statutory construction by administrative bodies, the Court commented as follows (380 U.S. at 16):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Power Reactor Co. v. International Union of Electrical, etc., 367 U.S. 396, 408.

Applying these principles, the Court stated the following standard as appropriate in the case before it: "If, therefore, the Secretary's interpretation is not unreasonable, if the language of the orders bears his construction, we must reverse the Court of Appeals." 380 U.S. at 18.

We submit that the same standard is appropriate here. We show below that the Board's consistent interpretation of Section 10(k), from the time of its enactment more than 20 years ago, is a reasonable interpretation within the language of the Act and purposes of Congress, and therefore should have been affirmed by the court of appeals below.

## II. The Board's Construction Of Section 10(k) Is A Reasonable Interpretation Of The Statutory Language And Fully Comports With The Legislative Purposes

### A. *The Statutory Language Requires The Interpretation Given By The Board*

The Board's construction of Section 10(k) to conclude that the employer is one of the "parties" to a jurisdictional dispute for the purposes of the abstention provision of that section fully comports with the plain meaning of the statutory language. Section 10(k), in appropriate part, reads as follows:

> *Whenever* it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and *directed* to determine the *dispute out of which such unfair labor practice shall have arisen, unless*, within ten days after notice that such charge has been filed, the *parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. [Emphasis supplied.].

Thus, by its terms Section 10(k) is operative only after a charge under Section 8(b)(4)(D) has been filed with the Board. And "whenever" such a charge is filed, the Board is mandated to "determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute" agree on a method for the voluntary adjustment of the dispute.

It is plain that the statutory language contemplates that the employer is one of the "parties" to the dispute. The "parties to such dispute", as the abstention provision in § 10(k) reads, refers by its terms to "the dispute out of which such unfair labor practice shall have arisen". The employer is necessarily a "party" to that dispute for there can be no unfair labor practice under

§ 8(b)(4)(D) until one of the unions or employee groups strikes or takes other coercive action *against the employer* to require him to assign the particular work to its members. Thus, the unfair labor practice cannot *arise* until the employer has been brought into the dispute by one of the unions seeking to compel him to grant the result desired.

This Court made this perfectly clear in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964), where it discussed the relevant statutory provisions as follows (375 U.S. at 263-264 [emphasis supplied]):

> We have here a so-called "jurisdictional" dispute involving two unions and the employer. But the term "jurisdictional" is not a word of a single meaning. In the setting of the present case this "jurisdictional" dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work. *If this controversy is considered to be the former, the National Labor Relations Act* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) *does not purport to cover all phases and stages of it.* While § 8(b)(4)(D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike. The Act and its remedies for "jurisdictional" controversies of that nature come into play only by a strike or a threat of a strike. Such conduct gives the Board authority under § 10(k) to resolve the dispute.*

Accordingly, neither Sections 8(b)(4)(D) nor 10(k) are operative until one of the unions has by its coercive action already made the employer a party to the dispute.

This coercive action therefore necessarily makes the employer a party to the "dispute out of which the unfair labor practice" arose, and thus, one of the "parties to such dispute" within the terms of the abstention provision of §10(k).

Further, the language of Section 8(b)(4)(D) also supports the Board's construction. For the plain language therein reflects Congress' recognition that some jurisdictional disputes within the Act's proscription do not involve an active dispute between two rival unions, but actually involve a dispute between a union and an employer over the employer's assignment of particular work to unrepresented employees. *See Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F.2d 38, 47 (8th Cir. 1962) (dictum: work-assignment dispute provisions of 8(b)(4)(D) and 303 "are also applicable when the dispute might be said to be solely between an employer and a union"); *National Labor Relations Board* v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449, 454 (2nd Cir. 1967) (dictum).

The precise language of §8(b)(4)(D) proscribes strikes or other coercion designed to force "an employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." Thus, Congress recognized that an employer may assign work to his own unrepresented employees rather than to employees in a labor organization, and that such an assignment, where a union picketed or struck in protest, should be subject to the same dispute-settling procedures and same protections as other protested work assignments under the Act. Clearly, the real dispute over the work assignment in such a circumstance would in actuality be between the union and the employer making the assign-

ment.[13] Should the union picket in protest of the assignment, the employer manifestly would be one of the parties to the "dispute out of which such unfair labor practice shall have arisen". Accordingly, for this purpose, the language of the statute plainly dictates that the employer is one of the "parties to such dispute" within the meaning of Section 10(k).

Moreover, the language used in Section 8(b)(4)(D) did not appear in the statute through mere inadvertence. That provision, as it passed the Senate, proscribed the use of the prohibited coercion where it was designed to force "any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization. . . ." [14] In conference, the language was amended to include the language which was adopted in the final bill. This change was vigorously opposed on the Senate floor on the ground that it broadened the Senate's objectives in proscribing jurisdictional disputes and also created a technique for employers to undermine craft unions.[15] Senator

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[13] In this situation the union has no active dispute with anyone but the employer. The unrepresented employees are not an entity, have no organization or structure, and have no background or competence to dispute the union's claim for the work or to represent themselves in any dispute-settling mechanism. Most likely, the unrepresented employees made no claim for the work originally but merely accepted the assignment from their employer in the usual course of their employment relationship, but this acceptance does not create a general jurisdictional threat against the union elsewhere. Of course, the union's basic dispute is that it did not get the work; but the thrust of its dispute would obviously be directed more toward the employer's active assignment of the work to these employees than it would be toward the passive act of the employees in accepting it in the line of their employer-employee relationship.

[14] H.R. 3020, as passed by the Senate, 80th Cong., 1st Sess. pp. 81-83, in I Legislative History of the Labor-Management Relations Act (herein "Leg. Hist.") 239-241 (1947).

[15] 93 Cong. Rec. 6662 (Daily ed., June 6, 1947), in II Leg. Hist. 1579 (1947) (remarks of Senator Murray); 93 Cong. Rec. 6672-6673 (Daily ed., June 6, 1947), in II Leg. Hist. 1589 (1947) (remarks of Senator Pepper).

Taft, co-author of the bill and a Senate conferee, responded to this charge by admitting that the conference change would make Section 8(b)(4)(D) applicable to strikes over assignments to nonunion employees as well as to unions, but he denied that it would create a statutory technique for undermining craft unions. Senator Taft responded that Section 8(a)(3) would operate to prohibit any discriminatory work assignments, and he further argued that the salutary objective of the change in conference would be to protect employers from strikes and picketing by unions for the purpose of coercing the employer to assign work to union members rather than to assign the work to non-union employees for legitimate reasons.[16] The bill passed and was signed into law incorporating the language adopted in conference.

Accordingly, Congress plainly intended to bring within the Act's jurisdictional dispute provisions strikes involving disputes which are essentially between a union and an employer over the employer's work assignment to non-union employees. Thus, Congress plainly recognized the employer as one of the parties to such disputes. In the absence of any statutory indications to the contrary, Congress' recognition of the employer as a party to a jurisdictional dispute under this circumstance is weighty evidence that Congress intended that the employer be considered a party to jurisdictional disputes for all purposes under Sections 8(b)(4)(D) and 10(k).[17]

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[16] 93 Cong. Rec. 7000 (Daily ed., June 12, 1947), in II Leg. Hist. 1624 (1947).

[17] As the Board held in *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (1949) and *International Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949), there is no statutory language nor persuasive legislative history to support any Congressional desire to limit the application of Section 10(k) only to certain situations. Indeed, as the Board found, the statutory language itself directs the Board to invoke Section 10(k) "whenever" a charge under Section 8(b)(4)(D) is filed.

### B. *The Full Legislative History Provides Support For The Board's Interpretation*

The relevant legislative history does not directly resolve the issue of the meaning of "the parties to such dispute" as used in the abstention provision of § 10(k), for the committee reports and floor debates disclose absolutely no discussion of the precise meaning of the word "parties" in this context. However, the legislative history does provide general support for the construction made by the Board.

There was no provision in the House bill comparable to Section 10(k). Instead, the House bill sought to protect employers from all strikes over work assignments. The bill made all "jurisdictional strikes" an "unlawful concerted activity", and provided the injured employer with the right to sue for damages and injunctive relief in a federal district court. The bill defined a jurisdictional strike as a strike or other concerted interference with an employer's operations for an object of requiring "that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class".[18] Thus, this bill provided the employer with full protection against any strike over any work assignment, either to union or to non-union employees. And it granted in the employer the full power and right to protect his substantive interests in the assignment by seeking damages and injunctive relief in court in his own right.

The Senate bill, emanating from an amendment offered by Senator Morse, adopted the form and much of the

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[18] See Sections 2(15) and 12(a) of H.R. 3020 (as passed by the House) 80th Cong., 1st Sess., pp. 12, 47-50, in I Leg. Hist. 169, 204-207 (1947). The relevant language therein is identical to the bill as reported by the House Education and Labor Committee, H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 12-13, 47-50, in I Leg. Hist. 42-43, 77-80 (April 11, 1947).

language ultimately enacted. In that bill, Section 8(b)(4)(D) made it an unfair labor practice for a labor organization to strike, or engage in other coercive activity, "for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the National Labor Relations Board. . . ." And Section 10(k) set up machinery to decide the underlying dispute by empowering the Board "to hear and determine the dispute out of which such unfair labor practice shall have arisen *or to appoint an arbitrator to hear and determine such dispute*, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." [19]

In conference, the Senate bill was adopted with two major modifications, both of which provide support for the Board's construction. For one, the provision authorizing the Board to appoint arbitrators "was eliminated . . . leaving it to the Board alone 'to hear and determine' the underlying jurisdictional dispute." *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 581-582 (1961). This change was vigorously opposed by Senator Morse and others during the Senate's consideration of the conference report bill. They argued that the arbitrator provision was essential because arbitrators had superior technical proficiency and experience over the Board in this area and because they could issue decisions far more quickly than could the Board through its usual

[19] H.R. 3020 (as passed by the Senate), 80th Cong., 1st Sess., pp. 81-82, 100-101, in I Leg. Hist. 239-241, 258-259 (1947). Virtually the same language was contained in the original Senate bill as it was reported from the Committee on Labor and Public Welfare. S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 14-16, 32, in I Leg. Hist. 112-114, 130 (1947).

procedures.[20] Despite these objections, the Senate accepted these provisions in the conference report bill, and the bill was enacted in that form.

The decision to eliminate the arbitrator provision plainly indicates Congress' preference that the Board, rather than arbitrators, have the ultimate responsibility for determining such disputes. As this Court commented in *CBS*, *supra*, 364 U.S. at 583:

> It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussions and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems.

Thus, Congress plainly decided that the public interest in the resolution of work-assignment disputes under 10 (k) was better placed in the hands of the Board than in private arbitrators. In light of this, it would seem totally inimical to this purpose to conclude that Congress intended to oust the Board of jurisdiction under the abstention provision of 10(k) whenever the unions involved in the dispute agreed on some form of binding arbitration to resolve the dispute. To do so would place the public interest in the resolution of such disputes solely in the hands of the unions and any self-serving arbitration machinery they might agree upon.[21] It is more

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[20] 93 Cong. Rec. 6610 (Daily ed., June 5, 1947), in II Leg. Hist. 1554-1555 (1947) (remarks of Senator Morse); 93 Cong. Rec. 6665 (Daily ed., June 6, 1947), in II Leg. Hist. 1585 (1947) (remarks of Senator Murray); 93 Cong. Rec. 6672-6673 (Daily ed., June 6, 1947), in II Leg. Hist. 1589 (1947) (remarks of Senator Pepper).

[21] See *National Labor Relations Board* v. *Local 25, I.B.E.W.*, 396 F.2d 591, 594 (2nd Cir. 1968), where the court pointed out that the Joint Board's practice of affording "little weight to considerations of economy and efficiency" did not accommodate the necessary protection of the public interest. The court explained its view of the proper furtherance of the public interest in this regard as follows:

> It would be surprising, indeed, to find the Board [NLRB], to which is entrusted the protection of the public interest in this

consonant with the Congressional purpose to conclude that, in the abstention provision in Section 10(k), Congress intended that the struck employer as well as the employee groups should agree on any method of voluntary arbitration before the Board's jurisdiction was ousted: the public interest would plainly be better served by having the views presented by all those involved and by having the dispute-settling machinery adopted by all those involved, for the interests of the public are obviously more likely to emerge and be considered when all sides of the controversy are presented and meaningfully considered.

The second major modification in conference was, as discussed above (pp. 22-23), to broaden the scope of the jurisdictional dispute provisions from the "rival unions" concept of the Senate bill to include, as the House bill provided, strikes over the employer's assignment to groups of unrepresented employees. The Senate bill, from its introduction in the form of Senator Morse's amendment, was aimed at jurisdictional disputes within organized labor. Senator Morse's explanation of the bill, and that of its other proponents, discussed the bill in terms of rival unions.[22] Indeed, Senator Morse emphasized that a

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area as in others, completely disregarding the factors of efficiency and economy in reaching its determination as to assignment of work. Nor is there any authority for such a startling proposition as that the national labor policy, which the Board is set up to further, requires that considerations of economy and efficiency in the employment of labor be ignored.

[22] See 93 Cong. Rec. 1890 (Daily ed., March 10, 1947), in II Leg. Hist. 960 (1947) (Senator Morse); 93 Cong. Rec. 4256 (Daily ed., April 28, 1947), in II Leg. Hist. 1057 (1947) (Senator Morse); 93 Cong. Rec. 6610 (Daily ed., June 5, 1947), in II Leg. Hist. 1554-1555 (1947) (Senator Morse); 93 Cong. Rec. 4155 (Daily ed., April 25, 1947) in II Leg. Hist. 1046 (1947) (Senator Murray); 93 Cong. Rec. 4225 (Daily ed., April 28, 1947), in II Leg. Hist. 1056-1057 (1947) (Senator Ellender); 93 Cong. Rec. 4416 (Daily ed., April 30, 1947), in II Leg. Hist. 1157 (1947) (Senator Smith); 93 Cong. Rec. 5063 (Daily ed., May 9, 1947), in II Leg. Hist. 1377 (1947) (Senator Hawkes); 93 Cong. Rec. 6662 (Daily ed., June 6, 1947), in II Leg. Hist. 1579 (1947) (Senator Murray).

major benefit of his bill would be to prevent without resort to the Act's machinery "some of the abuses which we seek to cure because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action." [23] This concern only with jurisdictional disputes between unions was incorporated in the language of Section 8(b)(4)(D) in the Senate bill, making it unlawful to strike over the assignment to "*members of a particular labor organization*" rather than to "members of some other labor organization . . . ."

The conference bill's broadening of this language to include strikes to force an employer "to assign particular work to *employees* in a *particular labor organization or in a particular trade, craft, or class* rather than to *employees* in another labor organization or in another trade, craft, or class . . . . [emphasis supplied]" plainly adopted the viewpoint of the House bill that *all strikes* against an employer's work assignments should be subject to the Act's machinery, not just those strikes in conjunction with a dispute between two unions over the work. The conferees obviously recognized, in accord with the primary thrust of the House bill, that the employer and not just the unions, had a substantive interest in his assignment of work, and that this interest was entitled to the protections of the Act. Accordingly, in accommodating that valid interest in the framework of the Act, it seems obvious that Congress contemplated that the employer be allowed to protect his interest in the one place where it is substantively affected—in the 10(k) proceedings. Con-

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[23] 93 Cong. Rec. 1910-1911 (Daily ed., March 10, 1947), in II Leg. Hist. 982-983 (1947). Although Senator Morse envisioned his bill would cause unions to establish machinery to settle "such disputes *short of economic action*", he gave no indication that such machinery would be appropriate *after* a strike or other economic action. Indeed, his comments indicate only that an arbitrator would be appointed to resolve the dispute once a work stoppage occurred. *Id.*

gress must have intended therefore to include the employer as a party to a jurisdictional dispute within the meaning of Section 10(k).

### C. *The Board's Interpretation Reflects a Recognition Of Economic Realities And Fair Accomodation Of Valid Interests In Conformance With National Labor Policies*

The Board's construction of Section 10(k) reflects its recognition of the basic reality that an employer has a direct and substantial substantive interest in his assignment of work to a particular group of employees, and that fundamental fairness requires that when this assignment is challenged by means proscribed by the statute, any statutory method for resolving the dispute over the work assignment must provide for the right of the employer meaningfully to participate in the dispute-settling process.

It is patently obvious that the employer has a vital and real interest in the assignment of his work and in the substantive outcome of the resolution of disputes challenging such assignments. The employer generally assigns work to a particular group of employees because of his preference for that group for reasons of economy, efficiency, ability, and the like. Where this assignment is challenged, and the work awarded to another group of employees, the result could have a direct impact on the economic welfare, even the economic survival of the employer, particularly in the construction industry where most jurisdictional disputes occur [24] and where the "employers are mostly small, marginal operators . . . ." [25]

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[24] The latest annual report of the Board shows that 66 percent of all jurisdictional dispute charges occurred in the construction industry during that fiscal year. 34 NLRB Ann. Rep. 204-205 (1969).

[25] Comment, *The Employer As A Necessary Party To Voluntary Settlement Of Work Assignment Disputes Under Section 10(k) Of*

In the construction industry, contractors usually obtain jobs through competitive bidding which is "characterized by closely figured bids with narrow profit margins." [26] The contractor's bid is drawn from economic considerations particularly relevant to the group to whom the contractor intends to assign the work, *e.g.*, their wage rates, working rules, relative efficiency, quality of performance, etc. Should a jurisdictional dispute result in the award of this work to a different group with higher cost factors, the contractor's profit margin could be quickly eliminated. Indeed, this result could even cause the contractor to give up the contract. This is shown in the instant case, where a representative of petitioner Martini Tile and Terrazzo Company testified before the Board that, for these reasons, the assignment of the work in dispute to members of the Plasterers rather than members of Tile Setters would deprive Martini of 30 percent of its business annually (A. 128).

In addition, the award of the work contrary to the contractor's desires could also cause him to lose the contract for other reasons. Where a contractor has properly assigned the work pursuant to a collective bargaining agreement with one union, the award of the work to members of a stranger union would force the contractor to give up the contract or else breach his agreement with the union. Of course, the employer would potentially be subject to a damage action under Section 301 of the Act [27] by the contracting union if the contractor did breach the contract and assign the work to the stranger union.[28]

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*The NLRA*, 38 U. Chi. L. Rev. 389, 402 (1971). *See The Wages of Building Zoom*, BUS. WEEK, July 19, 1969, at 89-90; O'Hanlon, *The Unchecked Power of the Building Trades*, FORTUNE, Dec. 1968, at 102.

[26] Comment, *supra* note 25, 38 U. Chi. L. Rev. at 401.

[27] 29 U.S.C. § 185.

[28] It is entirely possible for an arbitration award to assign the work to a stranger union although the employer assigned that work

The employer's very real substantive interest in his assignments of work and the outcome of disputes challenging these assignments has been well recognized.[29] The National Joint Board's inclusion of employer groups within its structure and its requirement that only contractors stipulated to its procedures are bound by its determinations are dramatic acknowledgements of the member unions' recognition of the employer's interest in the outcome of such disputes.[30] Indeed, Professor John T. Dunlop, the first Chairman of the Joint Board, commented on the recognition of the employer's interest after nearly a decade of Joint Board operation:

> The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues, and both have a vital contribution to make to their orderly settlement.[31]

Accordingly, the employer's substantial interest in the resolution of disputes over his assignments of work is undeniable. In light of this vital interest, basic and fundamental fairness would seem to require, as the Board's construction of 10(k) does, that the employer be included as a necessary party to any "agreed upon methods for the voluntary adjustment of, the dispute."

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pursuant to a collective bargaining agreement. For example, the National Joint Board does not recognize as valid jurisdictional claims contained in collective bargaining agreements. See K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 48 (1961).

[29] Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 399-400 (1971).

[30] See STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 89-99 (1961).

[31] Letter from John T. Dunlop to the Joint Negotiating Committees, the Secretaries of Signatory National Contractors, and the Associations and Members of the National Joint Board, July 25, 1957, in 40 LRRM 18, 19 (1957).

For otherwise, these interests would be directly affected by a determination made by other parties without his participation and without his assent either to the method of determination or to be bound by the determination.[32] Such a result is plainly offensive to any notion of fair consideration of interests, and has, in an analogous context, been held to violate due process. *See Retail Clerks Union, Local 770* v. *Thriftimart, Inc.*, 59 Cal.2d 421, 423-424, 380 P.2d 652, 655-656 (1963), where Chief Judge Traynor found that due process of law required the invalidation of an "arbitration award in the absence of a party directly affected by the award."[33] In so ruling, Judge Traynor quoted with approval from *Retail Clerks Local 428* v. *L. Bloom Sons Co.*, 173 Cal. App.2d 701, 703, 344 P.2d 51, 52-53 (1959), a case arising in a similar setting, as follows:

> Appellant is, in effect, urging the patently absurd proposition that two parties can by contract effectively stipulate for the mode of determination of the

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[32] It cannot fairly be argued that the employer's interests are not affected by the determination. Under the view of the court below (A. 363, 382-385), the Board would be ousted of jurisdiction under 10(k) whenever the unions involved agreed upon the method of adjustment. The resolution of the dispute under this procedure would then become the official resolution of the dispute under 10(k). Accordingly, should the award favor the striking union the employer would be forced to abide by the resolution reached by the unions or be subject to unlimited picketing on the part of the favored union. Thus, the employer's interests would be legally affected by the voluntary adjustment by the unions. *See* Comment, *supra*, note 25, 38 U. Chi. L. Rev. at 895; Note, 20 Cath. U. L. Rev. 342, 357 (1970).

[33] In that case, the union had a collective bargaining agreement with Thriftimart covering the representation of all Thriftimart's employees. Thriftimart, during the contract term, acquired ownership of all the stock of another company, MORE, through a purchase by one of Thriftimart's wholly-owned subsidiaries. The union claimed its contract covered MORE's employees, and an arbitrator found for the union. In an action to enforce the arbitration award, Judge Traynor reversed the arbitrator's award for the reason discussed above, since MORE was not a party to the arbitration.

> rights of a third party who has not only not assented to such a mode of determination but who also is not even accorded an opportunity to participate in such determination.

Accordingly, the Board's construction of Section 10(k) to require the employer's assent to any voluntary method of adjustment reflects a recognition of economic realities and an accommodation of valid interests with basic requirements of fundametal fairness. And the Board's construction in this regard draws support from other statutory practices and requirements of national labor policy.

Certainly, the employer in jurisdictional dispute has no less an interest in the resolution of the dispute than does the neutral employer in a secondary boycott situation,[34] or than the employer faced with organizational or recognitional picketing at his business operation,[35] or than the employer whose employees are fined for crossing picket lines.[36] Yet, in each of these situations the employer, as the charging party before the Board, just as the employers are in most jurisdictional dispute cases,[37] has the right to full participation in the substantive determination of the issue. The employer embroiled in a jurisdictional dispute is equally entitled to protect his substantive interests; since these interests are litigated only in the 10(k) proceedings, that is where he must be permitted full participation—both before the Board and

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[34] *E.g., Great Northern Railway Co.* v. *National Labor Relations Board,* 272 F.2d 741 (9th Cir. 1959).

[35] *E.g., Centralia Building and Construction Trades Council* v. *National Labor Relations Board,* 363 F.2d 699 (D.C. Cir. 1966).

[36] *E.g., National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967).

[37] The Board's most recent annual report shows that the employer was the charging party in 535 of 579 jurisdictional dispute cases brought before it in that fiscal year. 34 NLRB Ann. Rep. 197 (1969).

as a necessary party to any "agreed upon method" for voluntary adjustment.

Moreover, the Board's construction is consistent with the requirement under the Railway Labor Act that the Railroad Adjustment Board must determine jurisdictional disputes in a single proceeding involving the *employer and all the unions* involved. *See Transportation-Communications Employees Union* v. *Union Pacific Railroad Company*, 385 U.S. 157 (1966). In that case, the question was whether the Adjustment Board could determine such disputes on an individual contract basis, without the presence of one union. The Court found it could not, and that it was necessary to determine the whole dispute with all parties present: "The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature." *Id.* at 162. Significantly for the purposes here, Justice Stewart admonished the Adjustment Board to consider its decisions in the "industrial context" (385 U.S. at 166-168):

> To do justice to the parties in this situation the Board must take full measure of their circumstances. To justify the deference which the law has given to its decisions, the Board *must employ a decision-making technique that rests on fair procedure and industrial realities.* By using a simple bilateral contract analysis the Board defaults in both of these duties. [Emphasis added.]

Finally, the Board's construction of Section 10(k) to require the employer's assent to any voluntary adjustment is consonant with the underlying basis of all the body of arbitration law that has developed as a vital part of national labor policy, *i.e.*, that arbitration is consensual. It is settled law that parties are obligated to arbitrate only what they have agreed to arbitrate: "For arbitration is a matter of contract and a party cannot be requested to submit to arbitration any dispute which he has not

agreed so to submit." *United Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960); *accord*, *Retail Clerks Local 770* v. *Thriftimart, Inc.*, 59 Cal.2d 421, 380 P.2d 652, 655 (1963). In accord with this settled law, the Board has required, before it will give deference to an arbitration award for general purposes under the Act, that "all parties" involved must have agreed to be bound by the award. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). This general policy was cited with approval in *Carey* v. *Westinghouse*, 375 U.S. 261, 270-271 (1964).

For all these reasons, petitioners submit that the Board's interpretation of Section 10(k) to require the employer's assent to any voluntary method of adjustment is a reasonable construction in keeping with fundamental principles of fairness and with statutory and other national policies. In the words of Justice Stewart, the Board's construction "rests on fair procedure and industrial realities" (*Transportation-Communications Employees Union* v. *Union Pacific Railroad Company*, *supra*, 385 U.S. at 167-168), and petitioners submit it is entitled to affirmance.

### III. The Decision Of The Court Below Misconceives Salient Factors And Does Not Compel A Contrary Conclusion

The court below, in rejecting the Board's construction of the "parties" to 10(k) proceedings, relied on two basic grounds in concluding that Congress intended to exclude the employer as a party to 10(k) proceedings—(1) that Congress recognized the employer as a neutral party who cared not how the dispute was decided and (2) that the text of the Act shows that Congress intended only that the rival unions were the parties to jurisdictional disputes. We show below that the court's reasoning is erroneous as to both grounds.

### A. *The Neutrality Issue*

The central point in the court's analysis is that Congress' purpose in passing the jurisdictional dispute provisions was solely "to protect the employer who was 'neutral' in the dispute" between rival unions (A. 383). According to the court, this "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided." (A. 375). Because of this, the court concluded that Congress intended only the "rival unions" as parties to the dispute under Section 10(k).

The court recognized that the statutory provisions, which it referred to as "broad and unqualified in its terms", provided no basis for its neutrality point, but it found its authority from the Act's "dominant purpose to protect 'neutral' employees." (A. 384). The court relied on the following sources as the grounds for showing that dominant purpose.

1. The court relied heavily (A. 374-375) on this court's decision in *National Labor Relations Board* v. *Radio and Television Broadcost Engineers, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573 (1961), quoting in particular from the Court's analysis of the legislative history of 8(b)(4)(D), as follows:

> And the House Committee report on one of the proposals out of which these sections came recognized the necessity of enacting legislation to protect employers from being "the helpless victims of quarrels that do not concern them at all." [364 U.S. at 580-581].

Although this Court's quotation of the Committee report was entirely accurate for the purpose cited, it provides little, if any, support for the purpose cited by the court below. First of all, this Court cited the Committee

report as part of a chronological development of the legislative history leading to the ultimate conclusion that the purpose of 10(k) was to require the Board to make affirmative resolutions of jurisdictional disputes and "to award such tasks in accordance with its decision." 364 U.S. at 586. The issue of who were the proper parties to the 10(k) proceeding was not in issue because the employer there was avowedly neutral. 364 U.S. at 574-575.

More important, an examination of the House Committee report in full shows that it lends no support to the argument that Congress sought to protect only neutral employers. The full sentence of the report reads as follows:

> *More often than not* the employers are powerless to comply with demands giving rise to the activities, and *many times* they and their employees as well are the helpless victims of quarrels that do not concern them at all.[38]

Thus, the language of the report plainly indicates that it reached situations where the employer was *not* neutral, as well as when he was. Moreover, the statutory language proposed by the Committee (*supra*, pp. 25, 28-29) was perfectly clear that all jurisdictional strikes were considered unlawful without limitation to neutral employer situations. Therefore, reliance by the court below upon this point does not support its contention.

2. The court also placed reliance on the expressed hope of Senator Morse in the floor debates that 10(k) would encourage unions to set up machinery for the settlement of jurisdictional controversies within their own ranks. (A. 376-377). It is clear, however, that Senator Morse was speaking of the settlement of disputes by unions *anterior* to a strike and thus before the Act's provisions

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[38] H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 23, in I Leg. Hist. 314 (1947) (emphasis added).

become operative: in the speech quoted by the court (A. 377) Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (emphasis added).[39] Thus, Senator Morse spoke of the hope that unions could in most cases eliminate the dispute among themselves *prior* to embroiling the employer into the dispute *via* coercive economic action; his comments did not indicate that once the coervice action is instituted, the unions could under 10(k) settle the dispute among themselves without the employer's participation. However, the "incentive" to unions to settle the disputes among themselves in order to avoid the Act's machinery is equally present whether or not the employer is considered a party for purposes of Section 10(k).[40]

3. Similarly, other legislative history cited by the court does not support its contention. The court's reference to a sentence in the House Conference Report—describing Section 10(k) as directing the Board "to hear and determine disputes between unions giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes)"—is plainly ambiguous for the issue in dispute here. Since a jurisdictional strike necessarily implicates the employer, the statement as a whole can easily be read to mean that the new 10(k) provision would be applicable when the dispute erupted into a strike and embroiled the three parties—the employer and the unions—before the Board to settle the dispute.

Nor is Senator Morse's definitional memorandum, describing jurisdictional disputes as having as their common ingredient "a controversy between two or more la-

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[39] Senator Morse later made the same point and again referred to machinery settling such disputes "short of economic action." 93 Cong. Rec. 6610 (Daily Ed., June 5, 1947), in II Leg. Hist. 1555 (1947).

[40] In any event, there is no indication in Senator Morse's comments that the inter-union settlement machinery should exclude the employer.

bor unions" (A. 375-376), apposite. Although this definition surely describes the usual jurisdictional dispute, Congress expanded the definition of such disputes in Conference also to include disputes between a union and an employer over his assignment of work to unrepresented employees (*supra*, pp. 22-24, 28-29).

4. Accordingly, as shown above, there is little support in the factors cited by the court below to show that Congress intended to protect only neutral employers to jurisdictional disputes. On the other hand, the court overlooked several salient factors which strongly indicate a contrary intent. First, the language of Section 8(b)(4)(D), changed in Conference to bring under that section assignments of work to an employer's unrepresented employees (*supra*, pp. 22-24) plainly acknowledges Congress' intention to provide the same statutory protections where the employer is actively interested rather than neutral. Second, the text of the statute contains no requirement of employer neutrality, and the Board has specifically rejected the contention that the statute or its legislative history require the application of Section 10(k) only where the employer is neutral and indifferent to the result. *Lodge 68 of the International Association of Machinists (Moore Drydock Co.)*, 81 NLRB 1108 (1949); *International Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949). And finally, as discussed above, it is plain the employer is rarely neutral and indifferent to the result. In the absence of some convincing legislative history to the contrary, it must be assumed that Congress recognized that reality in the effectuation of the statutory scheme.[41]

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[41] Moreover, as one commentator has noted: "The fact that Congress intended to protect neutral employers does not require the inference that only neutral employers were considered worthy of protection. Indeed, other portions of the brief legislative history on this question suggest that all jurisdictional strikes were to be covered by 8(b)(4)(D) and 10(k), and that the dominant purpose

### B. *Interpretation of the Text*

The court below found support for its construction of 10(k) in the text of the statute. According to the court, the words "the parties to such dispute" in Section 10(k) refer to the parties to the underlying jurisdictional dispute, which it found to be the rival unions (A. 371). However, the statutory language does not refer to any "underlying" dispute; the dispute referred to by the language "parties to such dispute" is the "dispute out of which such unfair labor practice shall have arisen . . . ." And, as discussed above, the dispute out of which the unfair labor practice shall have arisen is the strike to compel the employer to assign the work to the striking union's members.

The court also found support from the text in the fact that "Congress could have written § 10(k)" so as to make all the parties to the unfair labor practice charge and the underlying dispute necessary parties "to a procedure for voluntary agreement" (A. 371). But this argument is not availing, for Congress could also have written 10(k) to read "unless the *rival unions involved in the dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute". Unfortunately, Congress wrote the statute in terms less than patently clear, and it enhances neither side to argue that Congress failed expressly to embrace the opposing position.

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of the statute was the 'elimination of the obstructions to the free flow of commerce' and the preservation of industrial peace by affording quick relief from jurisdictional pickets. Aside from one unexplained reference by Senator Morse to employer 'collusion', the legislative history is completely void of any congressional indication that neutrality was intended to be a prerequisite for 10(k) standing. * * * * The lack of significant legislative or executive comment on the neutrality issue makes it difficult to escape the conclusion that the problem was never really considered in the 10(k) context." Comment, *supra* note 25, 38 U. Chi. L. Rev. at 396-398.

Further, the court found "persuasive evidence" from the failure of Congress specifically to bind the employer to the 10(k) determination (A. 371). But this, too, does not support the conclusion that Congress therefore meant to exclude the employer as a party to such disputes. For 10(k), of itself, binds none of the parties. A union which strikes contrary to the award in a 10(k) determination becomes bound only after an unfair labor practice finding under Section 8(b)(4)(D), which finding would require that the strike or picketing cease. But for practical purposes, the employer is similarly bound, for if he ignores a 10(k) award he is subject to unlimited picketing by the union receiving the award and no Section 8(b)(4)(D) charge will lie. See *Local 502, International Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963).

Hence, the employer is under compelling pressure to accept a 10(k) determination, and no "persuasive evidence" can properly be drawn from Congress' failure legally to bind the employer to the 10(k) award unless it can be assumed that Congress did not recognize the economic realities involved.

### C. *Other Considerations*

The court's consideration of other factors to support its construction also merits attention.

1. For guidance as to the meaning of "the parties to such dispute", the court relied upon language from *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 579 (1961), where the Court referred to a jurisdictional dispute under 8(b)(4)(D) as "a dispute between two or more groups of employees over which is entitled to do certain work for an employer." Of course, as discussed above (p. 37), the quoted language was dictum, for the Court was not there faced with the issue of

determining the scope of "parties" within Section 10(k).[42] In any event, the language in *CBS* is offset by the Court's subsequent language in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263 (1964), where the Court referred to a jurisdictional dispute as "involving two unions *and the employer*" (emphasis added).

2. Nor is the court correct in urging that its decision finds support in the strong federal labor policy favoring arbitration (A. 381). As discussed above (pp. 35-36), that policy is premised upon the existence of the mutual consent of the affected parties to arbitrate the matter, a factor which the court's construction overrides. Moreover, this contention begs the issue presented: the issue is not whether arbitration is desirable, but rather, who are the proper parties to the arbitration.[43]

In any event, the Board's interpretation does give full scope to voluntary arbitration within the intent of *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). That decision recognized the possibility that arbitration without the presence of all parties "may as a practical matter end the controversy or put into movement forces that will resolve it", and that the potential advantage to be gained thereby justified its use. 375 U.S. at 265. The court rec-

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[42] See *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157, 164 (1966), where the Court declined to rely upon dictum from an earlier decision which pointed to a result contrary to that reached by the Court. The Court there expressly "declined to expand" the earlier decision "beyond its holding."

[43] Of course, arbitration has an advantage over NLRB procedures because, as the court below noted (A. 381), of the "relative speed of voluntary arbitration." But Congress specifically rejected this advantage when it chose to grant full responsibility for the resolution of jurisdictional disputes in the Board rather than arbitrators. See pp. 25-28, *supra;* 93 Cong. Rec. 6610 (Daily ed., June 5, 1947), in II Leg. Hist. 1554 (1947) (remarks of Senator Morse). The advantages of the relative speed of voluntary arbitration in no way appears to have dictated Congress' intentions as to the appropriate "parties" to a jurisdictional dispute.

ognized that the Board's "superior authority" may ultimately be invoked to resolve the matter, but that "the Board shows deference to the arbitral award." 375 U.S. at 270-272. The Board's construction here plainly accords with this view.[44]

### D. *Summary And Conclusion: The Instant Case*

Petitioners herein submit that the foregoing analysis shows that the court's decision does not compel rejection of the Board's consistent construction of the statute. At best, the court's analysis establishes an arguable construction of the text and legislative history; it plainly fails to establish that the Board's construction is unreasonable. Therefore, petitioners submit that the Board's construction must be upheld. See cases cited pp. 18-19 *supra*.

Indeed, the court's own analysis of the statute is undermined by its recognition that its interpretation of the statute might have to yield where the unions' "procedure for adjustment was subject to an infirmity that undercut its fairness", such as "an inter-union proceeding that made no realistic provision for meaningful attention to the interest of the employer and to questions of efficiency" (A. 384-385).[45] Thus, the court's analysis suffers from

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[44] In the instant case, the Board gave consideration to the award of the Joint Board but declined to accord it "controlling weight" in view of "all the circumstances, including its ambiguous nature, and upon the entire record . . . ." (A. 22.) As a matter of policy, the Board considers Joint Board awards as one of the factors in making its resolution of the merits of a jurisdictional dispute. See *International Association of Machinists, Lodge No. 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402, 1410-1411 (1962).

[45] The court's conclusion that the National Joint Board is not subject to such infirmity is subject to question. At least one court and many commentators have found that the Joint Board fails to recognize consideration of economy and efficiency in its awards, relying instead essentially upon past agreements and decisions of records, many ancient and outmoded, dating back to 1903. See *National Labor Relations Board* v. *Local 25, I.B.E.W.*, 396 F.2d 591, 594 (2nd Cir. 1968); K. STRAND, JURISDICTIONAL DISPUTES

this retreat away from the adamant position stated throughout its opinion that the Act's protections were designed solely to protect the neutral employer "who cares not how the dispute is decided but wants merely that it be decided" and that such protection is "fully served by *any* binding settlement between the disputing employee groups" (A. 375). The court's reservation in this respect serves to emphasize that the employer *does have* a direct interest in these disputes and that he necessarily must assent to any voluntary arbitration of the dispute before his interests can be affected.

This is emphasized by the facts of the instant case in light of the award of the Joint Board. The petitioning contractors had previously been stipulated to the Joint Board through their association with petitioner Tile Contractors Association, but withdrew along with the Association because of their dissatisfaction with the Joint Board's recognition of managerial factors. Each had a collective bargaining agreement recognizing the Tile Setters' as the representative of their employees (A. 15, 17). Each was satisfied with the "quality of their [Tile Setters'] work and the cost of employing them" (A. 23). When the Plasterers, who had no contract with either contractor, sought the work, the Joint Board awarded the work to Plasterers solely on the basis of an agreement between the respective International Unions dated August 22, 1917, and a decision of record dated February 21, 1924 (A. 315-316, 341-343). The Joint Board articulated no consideration of economy, efficiency, relative skills, ef-

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IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 45 (1961); Comment, *supra* note 25, 38 U. Chi. L. Rev. at 401 (1971); Note, *The NLRB and Deference to Arbitration*, 77 Yale L. J. 1191, 1200-1201 n. 52 (1968); Note, *The Non-Neutral Employer and Section 10(k) of the NLRA*, 20 Cath. U. L. Rev. 342, 355-356 (1970). For this reason, many employer groups, including petitioner Tile Contractors Association, have withdrawn from the National Joint Board in recent years. See Amicus Brief of Associated General Contractors *et al.* in support of petitions for certiorari in this case, p. 16.

fect of applicable collective bargaining agreements, or employer preference, all factors considered by the Board in reaching the contrary result.

Accordingly, under the court's view, the Joint Board could issue an award, as here, directly affecting the employer's interests without consideration of any managerial necessities and without even the employer's participation. Petitioners submit that the Board's interpretation of the statute is the better view. It rests on fair procedures and industrial realities and protects the interests of the public and all directly involved by requiring, before the Board will abstain from resolving the dispute, that the employer and the employee groups involved jointly agree on a binding method of resolution; it therefore maximizes the full consideration of all the legitimate interests of those involved, a result which best promises to accommodate the public interest.

## CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case should be remanded to that court for a ruling on the Board's decision on the merits.

Respectfully submitted,

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Dated: May 1971

## APPENDIX A

The applicable provisions of the National Labor Relations Act are as follows:

Section 8(b)(4)(D): It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade craft, or class rather than to employees in another labor organization or in another tradecraft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * *

Section 10(k): Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the

Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period:

*Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1184

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL–CIO, ET AL.

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No. 1231

TEXAS STATE TILE & TERRAZZO COMPANY, INC. ET AL., PETITIONERS

*v.*

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL–CIO, ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### OPINIONS BELOW

The opinion of the court of appeals (A. 361–397) is not yet officially reported. The decision and order of the National Labor Relations Board in the unfair